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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JASON WILLIAM SPITTLE,
STEPHEN CHARLES DAVIS, ANDREW HINSCH,
and JOHN HUBERTS

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Appeal 2012-007567
Application 12/204,511
Technology Center 1700

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Before BRADLEY R. GARRIS, PETER F. KRATZ, and
LINDA M. GAUDETTE, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134, Appellants appeal from the Examiner's rejection under 35 U.S.C. § 103(a) of claims 1-3 and 5-19 as unpatentable over Peng (US Patent Publication No. 2005/0254055 A1, published Nov. 17, 2005) in view of Acker et al. (US 3,837,746, patented Sep. 24, 1974). We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM.

Appellants claim an apparatus or system for measuring characteristics such as temperature and pH of a culture medium comprising a reader unit 10, 20, comprising a culture vessel 24, and a separate cuvette 28 containing the same medium as the culture vessel, wherein the measurement is carried out in the cuvette, wherein the culture vessel and cuvette may be retained by a gripper arrangement 22, and wherein the reader unit is configured to measure the characteristics when the reader unit, culture vessel, and cuvette are outside an incubator (sole independent claims 1 and 13; *see* Figs. 1-2).

A copy of representative claim 1, taken from the Claims Appendix of the Appeal Brief, appears below.

1. An incubation condition monitoring device comprising at least one reader unit to measure selected characteristics within an incubator, a receiver/transmitter mechanism to convey the measurements of the selected characteristics to a data logger outside the incubator and a monitor and display system to monitor and display the measurements of the selected characteristics, wherein each reader unit comprises a gripper arrangement to grip and retain a culture vessel and a separate cuvette containing the same medium as the culture vessel and the measurement of the selected characteristic is carried out in the cuvette,

wherein the reader unit is configured to enable monitoring of the selected characteristics when the reader unit is removed from the incubator while retaining the culture vessel and cuvette.

Appellants do not present separate arguments directed to the dependent claims on appeal (i.e., claims 2, 3, 5-12, and 14-19) (Br. 3-7). Therefore, the dependent claims will stand or fall with their parent independent claims.

We sustain the above rejection for the reasons given in the Answer. The comments below are added for emphasis.

The Examiner finds that Peng discloses an apparatus or system comprising a reader unit which clamps or grips a culture vessel and measures characteristics of the culture medium in the vessel but does not disclose a separate cuvette for containing the culture medium to be measured as required by independent claims 1 and 13 or a gripper arrangement for retaining a cuvette as well as the culture vessel as required by independent claim 1 (Ans. 6). The Examiner also finds that Acker discloses a culture monitoring system comprising a culture vessel and separate cuvette (i.e., for the culture medium to be measured) with a gripper arrangement therefor (*id.*). In light of these findings, the Examiner concludes that it would have been prima facie obvious to provide Peng with a culture vessel having a separate cuvette and a gripper arrangement for the cuvette and culture vessel as taught by Acker (*id*. at 7).

Appellants argue that Peng teaches away from the combination proposed by the Examiner and required by the independent claims by criticizing conventional equipment which includes a separate cuvette as rendering measurements very tedious or even impossible when continuous measurement is required especially when biological cells are in a growing and shaking environment (Br. 4-7 quoting paras. 0006, 0007, and 0021 of Peng).

The Examiner responds to this argument by pointing out that the proposed combination is not antithetical to the teachings of Peng but rather improves on these teachings (Ans. 10-12). We agree with the Examiner. The culture vessel, separate cuvette, and gripper arrangement taught by Acker are designed for continuous measurement in a cell-growing and

shaking environment (*see, e.g.*, Abst. and col. 1, ll. 12-20) as desired by Peng (*see, e.g.*, Abst. and para. 0025).

For these reasons, an artisan would have considered the teachings of Peng and Acker to complement one another and would have combined these teachings in the manner proposed in order to obtain the predictable use of prior art elements (e.g., a culture vessel, separate cuvette, and gripper arrangement) according to their established functions (e.g., for continuous measurement in a cell-growing and shaking environment). *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (in assessing the obviousness of a claim to a combination of prior art elements, the question to be asked is "whether the improvement is more than the predictable use of prior art elements according to their established functions").

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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